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IN THE
COURT OF APPEALS OF INDIANA

WALTER TOWNSEND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0606-CR-546
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Commissioner
Cause No. 49G03-0304-FB-57102

April 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Walter Townsend appeals his convictions for Class B felony possession of a firearm by a serious violent felon and Class C felony intimidation. We affirm in part, reverse in part, and remand.

Issue

The restated dispositive issue before us is whether the trial court properly admitted statements Townsend made to a sheriff's deputy.

Facts

The evidence most favorable to the convictions reveals that in February 2003, Demond Jones purchased a used car from Townsend for $450 cash. Jones did not see Townsend again until April 9, 2003. On that date, Jones noticed that Townsend had followed him to the parking lot of Jones's apartment complex. Townsend parked beside Jones, and both men rolled down their windows. Townsend then displayed a handgun and began yelling at Jones, asking, "Where is my money at?" Tr. p. 76.

Jones told Townsend that he did not owe any more money, but because of Townsend's insistence he lied and told Townsend he had to drive to another apartment complex where he lived to retrieve the money. After arriving at the other complex, Townsend blocked in Jones's vehicle and exited his car, again displaying the handgun and yelling at Jones and demanding money. Sometime thereafter, Marion County Deputy Sheriff Brandon Cooper arrived on the scene in response to a dispatch alleging a disturbance at the apartment complex. Townsend was sitting in the driver's seat of his car with his legs outside the vehicle and Jones was outside his vehicle when Deputy

Cooper arrived. He ordered Townsend and Jones to put their hands up and lie on the ground.

Jones then told Deputy Cooper that Townsend had a gun but had thrown it in his vehicle when Deputy Cooper had arrived and ordered them on the ground. Deputy Cooper then looked in Townsend's car and saw a gun on the driver's seat. After seeing the gun, Deputy Cooper handcuffed both Jones and Townsend. Deputy Cooper retrieved the gun and asked Jones if that was the gun he meant, and he said it was. Townsend then told Deputy Cooper that the gun was his; contrary to the State's claim, the record is not completely clear as to whether Townsend volunteered this information without any questioning from Deputy Cooper.[1]

Deputy Cooper then directed Jones and Townsend not to move while he waited for backup officers to arrive on the scene. After those officers arrived, they separated Jones and Townsend. Deputy Cooper first spoke to Jones, who described how Townsend had pointed a gun at him and threatened him with harm or death if he did not pay Townsend. Deputy Cooper then spoke with Townsend, who was still handcuffed, and asked him, "What's going on? Why are we here today? What happened?" Tr. p. 144. Townsend told Deputy Cooper that he argued with Jones over money for the vehicle and had the gun in his hand the entire time in an attempt to frighten Jones into paying him, although he denied pointing it at Jones. Townsend had not been given Miranda warnings when he divulged this information to Deputy Cooper.

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[1] Jones testified that Deputy Cooper asked Townsend whether the gun was his. Deputy Cooper never directly testified whether he asked Townsend that question.

The State originally charged Townsend with Class B felony possession of a firearm by a serious violent felon,[2] Class C felony intimidation, Class D felony pointing a firearm, Class A misdemeanor carrying a handgun without a license, and Class B misdemeanor public intoxication. It later alleged that Townsend was an habitual offender. The State later dismissed the charges of carrying a handgun without a license and public intoxication. On November 13, 2003, a jury convicted Townsend of the possession of a firearm by serious violent felon and intimidation charges, but acquitted him of the pointing a firearm charge. It also found that Townsend was an habitual offender.

Following sentencing, Townsend did not timely file a notice of appeal. Eventually, on April 13, 2005, the trial court granted Townsend permission to file a belated notice of appeal. Upon the State's request we dismissed Townsend's appeal, concluding the trial court erred in granting permission to initiate a belated appeal. Townsend v. State, 843 N.E.2d 972, 975 (Ind. Ct. App. 2006). Our supreme court denied transfer, but in doing so noted that Townsend was free to file another belated notice of appeal with the trial court that met the requirements of Indiana Post-Conviction Rule 2(1). On June 23, 2006, Townsend filed another motion for permission to file a belated notice of appeal, which the trial court granted. This time, the State does not challenge the granting of the motion, and we now consider the merits of Townsend's appeal.

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[2] Townsend has a 1983 conviction for Class B felony armed robbery.

Analysis

Townsend asserts the trial court improperly allowed the State to introduce statements he made to Deputy Cooper without first receiving Miranda warnings. We first clarify what Townsend may properly challenge in this appeal and what he cannot. At trial, Townsend did not object to testimony, both by Jones and by Deputy Cooper, that Townsend stated, "Yes, that's my gun," immediately after Deputy Cooper found it in the vehicle in which Townsend had been sitting. Tr. pp. 84, 142. Townsend did object to later testimony by Deputy Cooper, relating in more detail what Townsend told him after other officers had arrived on the scene and Deputy Cooper asked him, "What happened?" Id. at 144. "Failure to object at trial to the admission of evidence results in waiver of that issue on appeal." Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003). Thus, on appeal Townsend cannot challenge the admission of his statement, related by both Jones and Deputy Cooper, that the gun was his.[3] He can challenge the admissibility of the later, more detailed statement he gave to Deputy Cooper describing his threatening behavior towards Jones.[4]

The State may not use statements stemming from custodial interrogation of the defendant unless it establishes that the defendant was first warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. Miranda v.

[3] Townsend also does not argue that admission of this statement was fundamentally erroneous.

[4] Townsend's later mumbled statement while riding in Deputy Cooper's vehicle, "today would be a good day to die," appears to have been volunteered without questioning or prompting by Deputy Cooper. Tr. p. 164. Our focus is on the statements made in direct response to Deputy Cooper's questioning.

Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). "When determining whether a person was in custody or deprived of his freedom, 'the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" Luna v. State, 788 N.E.2d 832, 833 (Ind. 2003) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983)). The term "interrogation" under Miranda refers to express questioning and any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690 (1980). An "incriminating response" is any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial. Id. at 301 n.5, 100 S. Ct. at 1690 n.5.

The State concedes that Townsend was in custody when he spoke with Deputy Cooper, after having been handcuffed and held at gunpoint and having been given no indication that he was free to go. See Wright v. State, 766 N.E.2d 1223, 1230 (Ind. Ct. App. 2002) (holding that defendant was in custody after he was handcuffed for officer safety). The State, however, denies that Deputy Cooper "interrogated" Townsend. It has been held, "Miranda warnings are not required prior to questioning as part of a general, on-the-scene investigation in a noncoercive atmosphere." Green v. State, 753 N.E.2d 52, 58 (Ind. Ct. App. 2001), trans. denied (emphasis added). Miranda also does not apply to "routine booking questions" such as gathering the biographical data necessary for police administrative purposes in processing the defendant. See Pennsylvania v. Muniz, 496 U.S. 582, 601-02, 110 S. Ct. 2638, 2650 (1990). Additionally, the need for quick

answers to questions in a situation posing a threat to public safety outweighs the need for Miranda advisements. See New York v. Quarles, 467 U.S. 649, 657, 104 S. Ct. 2626, 2632 (1984).

If we were to hold that Deputy Cooper's question, "What happened," while Townsend was in custody merely constituted general "on-the-scene" questioning not subject to Miranda, we would in effect create an exception to Miranda that could and sometimes would swallow the rule. We decline to do so. Deputy Cooper's questioning of Townsend, after he had been forced to the ground at gunpoint and handcuffed, did not take place "in a noncoercive atmosphere." Cf. Green, 753 N.E.2d at 58. Deputy Cooper also was not asking for specific biographical information necessary for administrative purposes. Finally, there was no public safety emergency at the time Deputy Cooper asked, "What happened?" Deputy Cooper had already located and secured the gun Townsend had been carrying; Townsend and Jones were handcuffed and separated; and there was no other outstanding threat to public safety. Instead, Deputy Cooper's question or questions appear to have been "clearly investigatory" and not related "to an objectively reasonable need to protect the police or the public from any immediate danger . . . ." Quarles, 467 U.S. at 659 n.8, 104 S. Ct. at 2633 n.8 (citing Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095 (1969)).

There is no doubt here that Townsend's freedom was curtailed significantly by his being handcuffed when Deputy Cooper questioned him. Additionally, Deputy Cooper's asking Townsend "What happened," clearly was intended to elicit information from Townsend related to the disturbance the deputy was investigating. Before being asked to

divulge such information, which Deputy Cooper knew from talking to Jones had the potential to be incriminating, Townsend should have been Mirandized. See Furnish v. State, 779 N.E.2d 576, 581 (Ind. Ct. App. 2002), trans. denied (holding that officer's question to handcuffed suspect, "damn, Delbert, where'd you get all the money" constituted custodial interrogation). Townsend's responses to Deputy Cooper's "What happened" question should not have been admitted into evidence.

The State argues that even if Townsend's statements in response to Deputy Cooper's question were erroneously admitted, their admission constituted harmless error. Statements obtained in violation of Miranda and erroneously admitted are subject to harmless error analysis. Morales v. State, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001). As distinguished from ordinary evidentiary error, a federal constitutional error is reviewed de novo and must be harmless beyond a reasonable doubt. Id. To be harmless, we must find that the error did not contribute to the verdict, that is, that the error was unimportant in relation to everything else the jury considered on the issue in question. Id.

With respect to Townsend's conviction for possession of a firearm by a serious violent felon, we find admission of the statements in question to be harmless beyond a reasonable doubt. As noted, Townsend did not object when both Jones and Deputy Cooper related that Townsend admitted that the gun was his, so that evidence was properly before the jury.[5] Additionally, Deputy Cooper found the gun on the driver's seat

[5] Additionally, Deputy Cooper's questions regarding the gun immediately after he arrived on the scene might have fallen within the "public safety" exception to Miranda announced in Quarles. We need not resolve the issue definitively, given Townsend's failure to object to this particular statement.

of a vehicle where he had observed Townsend sitting, alone, when he arrived on the scene and ordered Townsend to lie on the ground. Given this properly admitted evidence, we conclude that Townsend's additional admission to possessing the gun after being asked, "What happened," was harmless beyond a reasonable doubt with respect to the serious violent felon conviction.

We cannot reach the same conclusion with respect to the intimidation conviction. In order to convict Townsend of this crime as a Class C felony as charged, the State was required to prove that he communicated a threat to Jones with the intent that Jones engage in conduct against his will, and that Townsend drew a weapon while communicating that threat. See Ind. Code § 35-45-2-1(b)(2). Townsend testified at trial and denied threatening Jones, either with or without drawing a weapon. Jones, of course, testified to the contrary. There is no other direct evidence regarding the intimidation charge, save Townsend's statements to Deputy Cooper that he had indeed intended to frighten Jones into paying him and used the gun as part of that plan. Absent those statements, the case becomes a credibility contest between Townsend and Jones. There are indications that the jury did not believe Jones to be entirely credible, including that it did not convict Townsend of pointing a firearm despite Jones's testimony that he did so. Given the nature of this case—two witnesses giving diametrically opposed testimony—we are not comfortable saying that introduction of Townsend's un-Mirandized statements to Deputy Cooper that he threatened Jones with a gun was harmless beyond a reasonable doubt. Such statements would have bolstered Jones's credibility. Townsend's

intimidation conviction must be reversed.[6] Because Townsend does not argue there was insufficient evidence to support this conviction, he may be retried on this charge if the State so chooses. See Camm v. State, 812 N.E.2d 1127, 1138 (Ind. Ct. App. 2004), trans. denied.

Conclusion

Townsend's statements after Deputy Cooper asked him, "What happened," were obtained in violation of Miranda and should not have been admitted into evidence. Such error is harmless with respect to the conviction for possession of a firearm by a serious violent felon, but is not harmless with respect to the intimidation conviction. We affirm the serious violent felon conviction, reverse the intimidation conviction, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and VAIDIK, J., concur.

[6] Given our reversal of this conviction, we believe it is unnecessary to address Townsend's argument regarding the admission of evidence of his prior conviction for armed robbery during the State's case-in-chief, which was needed to support the serious violent felon charge. Townsend seems to acknowledge that such evidence was properly admitted with respect to the serious violent felon charge in accordance with this court's precedent but argues that he "was, on the accompanying Intimidation count, subjected to unfair prejudice that outweighed any probative value of the prior-conviction evidence." Appellant's Br. p. 12. Reversal of the intimidation conviction and any retrial solely on the intimidation count renders this concern moot.